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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE CITY OF CATHEDRAL CITY, Plaintiff and Respondent, v. CHANDLER J. MAHONEY et al., Defendants and Appellants.	E048522 (Super.Ct.No. INC064010) OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Reversed.

Law Offices of Thomas A. Nitti and Thomas A. Nitti for Defendants and Appellants.

Green, de Bortnowsky & Quintanilla, Joan Stevens Smyth and Randall Nakashima for Plaintiff and Respondent.

I. INTRODUCTION

Defendants Chandler J. Mahoney and Connie Ahumada appeal from an award of attorney fees in favor of plaintiff The City of Cathedral City (the City). Defendants contend: (1) the City's voluntary dismissal of the underlying action divested the trial court of personal and subject matter jurisdiction; (2) Health and Safety Code section 18404 and California Code of Regulations, title 25, section 1617, did not authorize the relief the City sought; and (3) the trial court's order is not supported by substantial evidence. We conclude the evidence was insufficient to support the trial court's order, and we therefore reverse that order.

II. FACTS AND PROCEDURAL BACKGROUND

On January 4, 2007, the City brought the underlying action against Mahoney and Marie Corporation, as owners of Marie's R.V. and Mobilehome Park (the Park), and Ahumada, as manager of the Park. The City sought, among other relief, the appointment of a receiver and an order closing the Park. The City alleged that in February 2005, an inspector had determined that the Park's main electrical panel was in substandard condition and was inadequate to supply the electrical needs of the park. The inspector had issued a notice of violation to Mahoney giving him 60 days to correct the violation. The City alleged that the Park experienced frequent power outages, and in July 2006, the inspector determined that the outages were caused by continued use of the substandard panel. The inspector served a notice of violation involving imminent hazards that also constituted an order to correct the violation by replacing the substandard panel with one

properly approved, installed, permitted, and inspected. A follow-up inspection revealed that defendants had failed to comply. In August 2006, the City notified Mahoney and Marie Corporation that their permit to operate the Park would be suspended effective September 12, 2006. A reinspection in December 2006 revealed that defendants had failed to install an approved panel.

On January 11, 2007, the City filed an ex parte application for a temporary restraining order seeking, among other relief, appointment of a receiver and closure of the Park. Mahoney filed an opposition to the City's application and attached a declaration in which he identified himself as president of Marie Corporation and stated that Marie Corporation owned the Park. The trial court granted a number of successive continuances of the hearing on the application. Meanwhile, defendants filed an answer denying the allegations of the complaint and asserting affirmative defenses.

On May 24, 2007, Marie Corporation filed a voluntary bankruptcy petition, and a bankruptcy stay went into effect as to Marie Corporation. On July 24, 2007, the bankruptcy court appointed a trustee for Marie Corporation's property. Thereafter, the trustee continued to operate the Park, and eventually closed the Park.

On April 10, 2008, the City took the hearing on the application off calendar on the grounds that a bankruptcy trustee had been appointed and had control over the property and the Park operations. On October 14, the City filed a request for dismissal of the complaint as to Mahoney and Ahumada, and the request was granted.

On October 24, 2008, the City filed a motion for attorney fees and costs against Mahoney and Ahumada. The City argued that it had "obtained significant relief" in the underlying action, and fees should be awarded under the "catalyst theory" of *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553. The trial court granted the motion.

Mahoney and Ahumada filed a motion for reconsideration on the ground of surprise, contending that they and their counsel had never received the notice of motion and motion and therefore had failed to file an opposition or to appear at the hearing on the motion. The trial court denied the motion for reconsideration. Mahoney and Ahumada filed a second motion for reconsideration. The trial court denied that motion as well.

III. DISCUSSION

A. Jurisdiction to Award Fees After Voluntary Dismissal

Defendants contend the City's voluntary dismissal of the underlying action against them divested the trial court of personal and subject matter jurisdiction.

"Following entry of a dismissal of an action by a plaintiff under Code of Civil Procedure section 581, a 'trial court is without jurisdiction to act further in the action [citations] except for the limited purpose of awarding costs and statutory attorney's fees. [Citations.]'" (*Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1405.) Thus, in *Harris*, the court held the trial court had no jurisdiction to vacate the plaintiff's dismissal without prejudice and to enter a new order dismissing the action with prejudice. (*Ibid.*) The court stated: "'A voluntary dismissal of an entire action deprives the court of subject matter

jurisdiction as well as personal jurisdiction of the parties.' [Citation.] Such jurisdiction 'cannot be conferred by consent, waiver, or estoppel, . . .' [Citation.]" (*Ibid.*)

It is well established that a dismissed *defendant* may invoke the jurisdiction of the court to seek attorney fees as the prevailing party. (E.g., *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 878-880.) However, neither party has cited any case in which a *plaintiff* sought attorney fees as the prevailing party against a dismissed defendant, and our own research has not revealed any case presenting that scenario.

Nonetheless, it is conceivable that under some circumstances, a plaintiff who dismisses its action might be entitled to recover costs and attorney fees from dismissed defendants. We thus decline to rule that the trial court lost jurisdiction to make such an award upon dismissal. As we discuss below, however, we conclude recovery of attorney fees is not warranted under the facts of the case before us because there was no evidentiary basis for such an award.

B. Sufficiency of Evidence to Support Award of Attorney Fees

Defendants contend the trial court's order is not supported by substantial evidence. We agree.

"'The standard of review on issues of attorney's fees and costs is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings

necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence.'" (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.)

The unverified complaint alleged that Mahoney "owns and controls the Park," and that Ahumada was "employed as the Park manager of the Park and thus controls the Park in that capacity." The complaint also alleged that Marie Corporation had "an ownership or management interest in the Park." Defendants generally and specifically denied all the allegations of the complaint, thus putting all the material allegations of the complaint in issue. (Code Civ. Proc., § 431.30, subd. (d); *Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627.) The City thereafter had the burden of proving all those material allegations. (See *Park City Services, Inc. v. Ford Motor Co., Inc.* (2006) 144 Cal.App.4th 295, 309 [Fourth Dist., Div. Two].)

After filing its complaint and ex parte application for temporary restraining order, the City obtained successive continuances of the hearing on the application. Significantly, *no fact in the action was ever adjudicated*, including even the foundational facts of Mahoney's and Ahumada's alleged roles as owner[1] and manager, respectively, of the Park.

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[1] In the bankruptcy proceedings, it was stated that Marie Corporation was the owner and operator of the Park and that Mahoney was the registered agent for the corporation. In its motion requesting attorney fees, the City asserted that "Mahoney, his wife and/or his corporations have owned [the Park] since the early 1970s." However, that assertion was unsupported by any evidence, and, moreover, the City's complaint contained no alter ego allegations against Mahoney.

In its motion, the City asserted that "Ahumada was the manager and an operator of the Park at the time this action was initiated." However, that assertion was unsupported by any evidence.

Moreover, in its motion, the City asserted it was the prevailing party because its lawsuit "was the catalyst that forced defendants to provide all requested relief to the City." (Capitalization and underlining omitted.) "Under the catalyst theory, attorney fees may be awarded even when litigation does not result in a judicial resolution if the *defendant* changes its behavior substantially because of, and in the manner sought by, the litigation." (*Graham v. DaimlerChrysler Corp., supra*, 34 Cal.4th at p. 560, italics added.)

The City has alleged, but has not proven in this action, any wrongful conduct on the part of Mahoney and Ahumada. No evidence of their alleged wrongdoing was ever provided to or resolved by a trier of fact. Other than making conclusionary statements, the City has not shown how Mahoney and Ahumada changed their behavior because of the litigation. Due process requires more than the bare allegations of a complaint as the basis for an award of attorney fees.

Nor does the motion for attorney fees make up for the deficiency of proof. The motion was supported by declarations of the City's counsel, Nicholas Hermsen, and the City's Chief Building Official, Gilbert Estrada[2] and various exhibits to those

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[2] Moreover, we note that the attorney fee request and award encompassed services that were outside the scope of the present action. Hermsen's declaration stated, in addition to describing the number of hours of legal services his firm and bankruptcy counsel had billed the City and the billing rates for the attorneys who had performed such services: "In the months prior to the appointment of the bankruptcy trustee on July 18, 2007, the City's Building Department and various residents contacted my office on several occasions concerning various code violations existing at the Park, such as a lack of running water and overflowing sewage. Only upon initiation of communication by me

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declarations. Hermsen's declaration referred to various motions and filings in the bankruptcy court, and documents identified as filings in the bankruptcy proceedings were attached as exhibits. However, the trial court was not asked to take judicial notice of those documents, and even if judicial notice had been requested (Evid. Code, §§ 452, subd. (d), 453)), "[w]e may take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact. [Citations.]" (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7.) The City has requested this court to take judicial notice under Evidence Code section 459 and California Rules of Court, rule 8.252, of various documents from superior court cases involving the same parties. However, the City has failed to offer any good reason why the documents, which were not offered below, should be considered for the first time on appeal. (See *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1569, fn. 7.) Moreover, the City has asked us to take judicial notice not only of the existence of the documents, but also of their contents, which we cannot do. (*Williams v. Wraxall*, *supra*, 33 Cal.App.4th

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with Defendants' counsel were many of these conditions abated." Estrada's declaration described problems of a gas leak, lack of running water, and sewage overflow at the Park. Although the existence of such conditions was indeed deplorable, the complaint in the present action was based *solely* on the defective electrical panel.

a p. 130, fn .7.) We conclude the fact of the existence of the documents would not be helpful to our disposition of the case, and we therefore deny the request.

We conclude the City has wholly failed to meet its burden of establishing that it was the prevailing party as against Mahoney and Ahumada. We therefore conclude the award of attorney fees was an abuse of discretion.

IV. DISPOSITION

The order appealed from is reversed. Defendants shall recover their costs on appeal.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.